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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE FLORES et al.,

Defendants and Appellants.

A148387

(Contra Costa County
Super. Ct. No. 5-151390-2)

Jane Doe was 11 years old when she had a baby. While she was in labor, Doe told police that she was impregnated by her mother's live-in boyfriend, Jose Flores. Flores denied this allegation and Doe's mother, Juana D. (Juana), denied prior knowledge of Flores's abuse. However, a jury convicted Flores of multiple sex offenses, and Juana of being an accessory to Flores's sexual abuse of Jane Doe. The jury also found both Flores and Juana guilty of felony child abuse. For his crimes, Flores was sentenced to a determinate term of 58 years, eight months in prison, and an indeterminate term of 150 years to life in prison. Juana received an aggregate prison sentence of 6 years, eight months.

On appeal, Juana seeks reversal of both of her convictions and Flores contends his child abuse conviction must be reversed. We affirm the judgments.

BACKGROUND

I. The Prosecution Evidence

At a jury trial conducted in December 2015 and January 2016, the prosecution presented extensive evidence of the events that led to charges against Flores and Juana. We focus on evidence that is relevant to the issues on appeal.

A. The Events of December 10, 2014

At approximately 1:40 a.m., Juana brought Jane Doe to Kaiser's emergency department in Richmond. Juana reported that her daughter was experiencing severe menstrual pain, which was not uncommon for her. The triage nurse suspected otherwise; although Jane Doe was only 11, she appeared to be in the late stage of pregnancy, with a dark line down the middle of her belly and visible stretch marks. Her blood pressure was high, her heart rate was elevated, and she reported a pain level of 10 out of 10.

At around 2:30 a.m., Jane Doe was examined by a doctor. Given her presentation, a pregnancy test was ordered notwithstanding her denial of a history of sexual activity. The test was positive and, after the doctor performed an ultrasound, Jane Doe admitted that her mother's boyfriend had gotten her pregnant, but she refused to discuss the matter further. Dr. Carla Wicks, an obstetrician, was called because Jane Doe appeared to be in labor.

When Dr. Wicks performed her examination at approximately 6:00 a.m., Jane Doe was eight centimeters dilated and in active labor. Based on Doe's report that her last period was in April, Wicks dated the pregnancy at between 33 and 39 weeks. Doe was confused about what was happening to her and did not seem to understand there was a baby inside of her. She was in a lot of pain and just wanted to be comfortable. She told Wicks that her

stepfather had been molesting her since she was eight years old and that the sexual encounters took place at home and in hotels.

Meanwhile, the San Pablo Police Department dispatched officers to Kaiser Richmond. They found Jane Doe in a hospital bed crying, in a lot of pain, hyperventilating, and having a hard time breathing. Despite these difficulties, the officers attempted to question Jane Doe and made an audio recording of the interview. Jane Doe reported that Flores, who she referred to as her dad, asked her to have sex with him. After they “did it,” she did not feel right. Sometimes she told him she did not feel right and then he stopped. When the officers asked Jane Doe if she understood what sex is, her response was “Kind of.” Doe told the officers that the sex started happening when she was eight, that it took place in motels, and that it happened many times. When the officers tried to ask more specific questions, Jane Doe cried harder and had trouble answering. After the interview was terminated to avoid causing Jane Doe any more difficulty, the officers interviewed Juana, who was crying and expressed shock and disbelief. Juana was cooperative and provided information about how to contact Flores.

Jane Doe was transferred to a hospital in Oakland that was equipped to handle her delivery. The pregnancy was high-risk because of Doe’s youth and lack of prenatal care.¹ Also, Dr. Wicks was concerned about the trauma Jane Doe could experience as an abuse victim and a child who was about to give birth. She accompanied Jane Doe in the ambulance and stayed with her until transferring her care to the attending physician in Oakland. At around

¹ Dr. Wicks, who was qualified as an expert at trial, testified that lack of prenatal care “can lead to death in certain cases,” and that extremely young people face a “higher risk of death or severe injury” from pregnancy than do adult women.

1:00 p.m., Jane Doe delivered a healthy baby. Following the delivery, she had severe high blood pressure that was treated with medication.

Ms. Hampton, a hospital social worker, met with Jane Doe and Juana to discuss their plans. Juana reported that she would take care of the baby and Jane Doe would return to school. Later that day, Hampton talked to Jane Doe alone. She was sad and scared and did not know what she wanted to do. She said that she had not known she was pregnant before she came to the hospital. She told Hampton that Flores began having sex with her when she was eight, she did not tell anyone about the abuse, and she did not understand why all this was happening to her.

Meanwhile, Flores was found and arrested. At 3:25 that morning, he had texted a co-worker that he would not be able to come to work because his daughter was in the hospital. At approximately 12:10 p.m., he was located driving on the highway between Winnemucca and Battle Mountain, Nevada. He was driving his Nissan van, which Juana had described to the police, but he had changed the rear license plate. Inside the van, officers found a backpack containing Flores's passport and a USB thumb drive. There were two videos on the thumb drive, both recorded in April 2014, using the same equipment. One video was of Jane Doe's 11th birthday party, the other showed a man recording himself while he performed sex acts on Jane Doe.

B. Juana's Police Interview

The day after Jane Doe gave birth, the police interviewed Juana and recorded her statement.² Initially, Juana claimed that she did not know Jane Doe was pregnant until she was informed of that fact by the emergency room doctor. Subsequently, Juana acknowledged that she kept a calendar of her

² The briefs filed in this appeal suggest that one or more appellate counsel may be under the mis-impression that this statement and other trial exhibits containing confidential information were filed under seal.

daughter's cycle and knew she had not had a period for several months. Juana explained that she intended to take Jane Doe to a doctor, but she kept putting it off because Jane Doe did not want to go. Eventually, Juana admitted that she did not take Jane Doe to the doctor because she was afraid that social services would take away her children. She told the officers that her children had been temporarily removed from her care in 2006 and she did not want that to happen again. Juana admitted that she had seen signs of pregnancy on her daughter's naked body when they bathed together. She thought to herself that Jane Doe was pregnant, but she did not say anything to her and she did not make a report because she was afraid.

C. The 2008 Sex Abuse Investigation

At trial, the prosecution presented evidence of a 2008 incident at Jane Doe's pre-school that prompted an investigation by the Children and Family Services Agency in San Francisco. Jane Doe's teacher observed Jane Doe making sexual movements while stretched out on top of a boy in her class. When the teacher asked Jane Doe about this, she disclosed that her dad had been touching her private parts. During the agency investigation, Jane Doe was interviewed twice. During the first interview, she initially said nobody touched her, but then said someone had. Jane Doe told the investigator that her mother was mad at her because she had lied about being touched and then she just continued to say that she had lied. During the second interview, Jane Doe said Flores had touched her, but then she recanted. Ultimately, the improper touching could not be substantiated, the investigation was closed, and Flores moved back in to Jane Doe's home.

D. Jane Doe's Trial Testimony

Jane Doe, who was 12 when she testified at trial, recalled meeting Flores when she was four or five. She and her older brother David would go

with Juana when she visited Flores at a gas station where he worked. Jane Doe recalled that during one visit, Flores told Juana that Jane Doe was very pretty. Later, Flores moved in with Jane Doe's family. By that time, Juana was pregnant with Jane Doe's little sister, who was born when Jane Doe was five.

Jane Doe testified that the first time Flores had sexual intercourse with her was before her little sister was born. She and David were visiting Flores at his parents' house, where he was living at the time. David, who was five years older than Jane Doe, went to take a shower because they were going to go out, and Jane Doe was left alone in a bedroom with Flores, who was sitting in a chair. He called Jane Doe over to him as he lowered his pants. Jane Doe knew something was wrong but complied. Flores had her pull down her pants and underwear and sit on his lap, putting his penis inside her vagina. Flores did not say anything to Jane Doe about what he was doing, and he stopped when the shower turned off. Afterward, Doe felt that what had happened was bad and she did not tell anybody about it.

Jane Doe testified that nothing similar to the incident at Flores's parents' house happened again until she was "like, nine years old." However, after Flores moved in with the family, he started kissing Jane Doe on the mouth. Juana told Flores to stop, and she also told Jane Doe to kiss Flores on the cheek. But Flores continued to kiss Jane Doe on the mouth "[a]lmost all the time." Doe recalled that when Juana was not present, Flores would tell Jane Doe to kiss him and he would open his mouth over hers for a long time. It is not clear when this kissing started, but Jane Doe testified Flores did this to her when she was eight and in third grade. Jane Doe told Flores she did not like these kisses, which made him mad. Doe also recalled that when she was eight and nine, Flores would tell her she was pretty, and when

she was 10, he called her his girlfriend and told her she could not like other boys because she belonged to him. Jane Doe told her mother that Flores said these things to her and complained that she did not like it.

Jane Doe testified that she was nine when she started having her period. Sometime after that, Flores resumed having sexual intercourse with Jane Doe. Doe testified about multiple sexual acts Flores performed on her when she was between the ages of nine and 10. By the time Jane Doe was 10, she knew that when Flores asked her to go someplace alone with him, he was going to do something to her. She did not want to go, but when she refused, Flores would get mad at her. He would get her to participate in sex acts by offering things in exchange, like a Justin Bieber poster that she had said she wanted.

Doe testified that when Flores wanted to have sex with her, he took her to a hotel, or to the hot tubs in Berkeley, or he told Juana that he was taking Jane Doe to the store with him and then found a dark place to park and have sex with her in the car. Other times, when Jane Doe's mom and brother were out, Flores would put Jane Doe's little sister in front of the television and then take Jane Doe into another room to have sex with her. Once, Flores made a video on his phone of himself having sex with Jane Doe on the couch.

Jane Doe testified that Flores told her that he would not get her pregnant because he would "take it out and not cum in" her. A few weeks after Jane Doe's 11th birthday, Flores told her that he had surgery so that she would not get pregnant and showed her a cut on his penis. After the surgery, Flores had sex with Jane Doe five or six more times. However, a few months after Jane Doe turned 11, Flores stopped having sex with her because she said she did not want to, she felt sick all the time, and her stomach was

growing. She threw up a few times, and other times she just felt really sick. And then she could not even bend down to tie her shoes.

Jane Doe testified that she did not tell her mom that she had been throwing up, but she did say that she felt “weird” and weak. When she complained of headaches, Juana gave her Tylenol. The summer between fifth and sixth grade, Jane Doe’s stomach got bigger and bigger, to the point that her mom and Flores had to take her shopping for new clothes. Jane Doe recalled that when she talked with her mom about why her stomach was getting so big, Juana told her she was probably just gaining weight, so she started exercising more. Jane Doe testified further that her mother knew her periods had stopped and had offered to take Jane Doe to the doctor, but she did not want to go. Jane Doe developed stretch marks and grew so large that she had to wear adult size 18 pants.

Jane Doe recalled an incident when Juana saw Jane Doe get out of the shower, commented that her stomach was very big and asked her to pee in a cup. Juana would not explain why she made this request and then dropped the matter when Jane Doe objected. At some time after that, Flores had Jane Doe take two pregnancy tests while Juana was at work. Both tests were positive, but Jane Doe did not believe it was true. Flores suggested that Jane Doe go to New York to stay with his cousin, have the baby, and then come back home alone. A few weeks later, Jane Doe started experiencing bad cramps and thought she could be getting her period. When the cramps did not stop for two days, Juana took Jane Doe to the emergency room. At the hospital, she was told she was pregnant, and then she had to tell her mother that Flores was the father. Jane Doe testified that when she was told she was going into foster care, she was not happy because she wanted to be with her mother and to protect her mom.

II. Juana's Defense

Juana's defense was that she did not know Flores was sexually abusing Jane Doe and that, under the circumstances, it was reasonable for her to believe that Flores was a good father and that the health issues Jane Doe experienced in 2014 were attributable to menstrual pain. To support her defense, Juana elicited testimony from friends and family, and testified herself.

Juana's friends and family members testified that they noticed Jane Doe was gaining weight in 2014, but they did not think she was pregnant. Nor did these witnesses see anything sexually inappropriate occur between Flores and Jane Doe. One of these witnesses was Juana's younger sister Martha. In 2006, Martha was a foster mother for Jane Doe and David during a period when social services had removed them from Juana's home. Martha testified that she had a close relationship with Juana and saw Jane Doe a few times a month. She remembered the 2008 incident at Jane Doe's pre-school and testified that after she heard about it, she asked Jane Doe if Flores had touched her. First, Jane Doe said yes, but then she said no. Martha also testified about a family gathering at her home in 2013, when Flores and Jane Doe left with their dog and then returned three hours later without the dog. Based on these and other experiences with her sister's family, Martha believed that Flores and Jane Doe had "a really attached relationship," but she did not see Flores behave in a sexually inappropriate way with Jane Doe or any other child.

Juana testified that prior to December 10, 2014, she did not know Jane Doe was pregnant or that Flores was having sex with Jane Doe. According to Juana, Jane Doe did not act afraid of Flores. Nor did she tell Juana that Flores was abusing her. When Jane Doe was being examined in the

emergency department, Juana could see she was in pain and thought she might have an infection, but Juana never “imagined” that Jane Doe was pregnant.

Juana acknowledged that when Jane Doe was in pre-school in 2008, she told a teacher that Flores had touched her vagina. But Juana felt that the incident had been mishandled by Jane Doe’s teacher. She testified that when the teacher first pulled her aside, she said that several children had been playing inappropriately and pulling their pants down. The teacher told Juana that when she scolded Jane Doe, the girl disclosed that her dad had touched her vagina and inserted his fingers inside of her. Juana was surprised by this report, started crying, and questioned how that could have happened without her knowing. This made the teacher nervous, so she called Jane Doe over and prompted the child to confirm that her dad had touched her “private parts.” At first, Jane Doe did not answer, but then when Juana asked Jane Doe if Flores had been touching her, she said yes.

Juana testified that she confronted Flores about Jane Doe’s disclosure, and that he denied the accusation but nevertheless complied with Juana’s request to leave the home. Subsequently, the social services agency did an investigation, which included interviews and a physical examination of Jane Doe. After the investigation was closed, Juana believed she had nothing to worry about because the charges against Flores had not been substantiated. Flores moved back into the house and a short time later the family moved from San Francisco to Richmond.

Juana denied ever seeing Flores and Jane Doe engage in behavior that she considered inappropriate. She acknowledged there was a period when her girls would greet Flores by kissing him on the mouth similar to the way that she greeted him. However, when Jane Doe was 10, Juana told her to

stop kissing Flores like that. Juana also acknowledged that at some point in 2013 or 2014, Jane Doe had told her that Flores called her his girlfriend. Juana asked Flores about this, but he denied calling Jane Doe his girlfriend. Juana was satisfied with Flores's responses and believed that he had not touched Jane Doe.

Juana admitted that at times she had worried about leaving Jane Doe home alone with Flores and that he might be touching her in a sexual way. She recounted an incident when she came into the room and caught Flores trying to kiss Jane Doe. She handled the matter by telling Flores she would "smack" him if he thought about doing that again.

Juana testified that Jane Doe was always a "little chubby," but in 2014 "all of a sudden" she started getting chubbier, then her periods stopped, and she started getting headaches. Juana thought this was strange and that Jane Doe might have a tumor. A few weeks before the baby was born, Juana saw Jane Doe get out of the shower and wondered if she was pregnant, but Juana told herself she was crazy because Jane Doe never went anywhere without Juana. Nevertheless, she asked Jane Doe if she was pregnant, but the girl said she was just constipated. After Juana gave her medication, Jane Doe seemed better.

Juana testified that she first learned that Jane Doe was pregnant at the Kaiser emergency department on December 10, 2014. Juana recalled that she "felt totally" like she was collapsing at the hospital when Jane Doe told her that Flores had sex with her. The first time that Juana knew this was true was when she saw the video that the police found in Flores's backpack. Juana recognized Flores's penis, a scar on his left wrist, the rest of his body, and her own living room, where the video was recorded.

Under cross-examination, Juana admitted that by January 2014, she suspected Flores was molesting Jane Doe, but she explained that she was not “100 percent sure.” She claimed that if she had actually seen something improper, she would have reported it to the police. Juana acknowledged that in 2006, before she met Flores, Jane Doe and David had been removed from her care, and she did not want to lose custody again. She knew that if the social services agency had substantiated a report of improper sexual conduct in her home, she could lose her children. Juana also acknowledged that the 2008 CPS investigation caused her to fear that she would lose her kids. She denied ever telling Jane Doe to say that the abuse did not happen, but she admitted that when Jane Doe’s teacher first told her about it, she became angry in front of Jane Doe. Juana attempted to explain that her anger was directed at the teacher, not at Jane Doe, because Juana felt that the teacher was trying to convince Jane Doe to accuse Flores of touching her.

III. Flores’s Defense

Flores’s defense was that the charges against him were not true. Flores testified that he never had sex with Jane Doe; he specifically denied having sex with her at his parents’ home, at his home, at hotels, at the Berkeley Hot Tubs, or in a car. He told the jury that the 2008 investigation of the pre-school incident had not concerned him because he had not done anything wrong. He said that he never talked to Jane Doe about that incident because he “saw it as a silly childish behavior” and he “knew it was not true.”

According to Flores, Juana used to ask him to take her to the hot tubs in Berkeley, which was something they did together when they were dating, and he recalled that Jane Doe had once asked him what the hot tubs were. Flores acknowledged that he sometimes treated Jane Doe differently than his

other daughter by paying her more attention and giving her things. He did this, he said, because Jane Doe confided in him that she hated her mother.

Flores recalled that in late 2014, Juana told him that she thought that Jane Doe either had a tumor or was pregnant because her stomach was getting so big. So, Flores purchased two pregnancy tests, but he did not give the tests to Jane Doe. On December 10, 2014, he wanted to go to the hospital with Jane Doe and Juana, but he had to work. He drove to Nevada that morning because he was working for a man named Mike who offered him \$500 to deliver a package.

IV. The Jury Verdicts

The jury convicted Flores of 44 separate felony sex offenses against Jane Doe. 16 convictions were for having sexual intercourse or sodomy with a child under the age of 10. (Pen. Code, § 288.7, subd. (a).)³ One of these convictions was for having intercourse with Jane Doe on or between August 2008 and June 2009, and the other convictions were for crimes committed between 2012 and 2014. Flores was also found guilty of 26 counts of lewd acts with a child under the age of 14. (§ 288, subd. (a).) He was convicted of committing five violations each year between 2009 and 2013 and one violation in 2014. The 2014 violation was accompanied by an enhancement for personally inflicting bodily harm on Jane Doe. (§ 667.61, subd. (j)(2).) Flores's two other sex offense convictions were for using a minor for sex to produce pornography (§ 311.14, subd. (a)), and possession of child pornography (§ 311.11, subd. (a)).

The jury convicted Juana of being an accessory after the fact to one of Flores's lewd conduct felonies. (§ 32.) Juana committed this offense on or

³ Statutory references are to the Penal Code, unless otherwise indicated.

between April 1, 2014 and December 10, 2014 in that, with knowledge that Flores had committed sex abuse, she harbored, concealed and aided him with the intent that he might avoid and escape arrest, trial, conviction and punishment for his crime.

Finally, Flores and Juana were both found guilty of committing felony child abuse in violation of section 273a, subdivision (a), which codifies a definition of child abuse that “ ‘broadly includes both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect.’ ” (*People v. Valdez* (2002) 27 Cal.4th 778, 784 (*Valdez*).) Returning separate guilty verdicts for each defendant, the jury found that Flores and Juana committed felony child abuse on or between April 1, 2014 and December 10, 2014.

JUANA’S APPEAL

I. Juana’s Convictions Are Supported by the Trial Evidence

Juana contends there is insufficient evidence to support either of her convictions. We review the jury verdicts under the familiar substantial evidence standard. (*People v. Clark* (2011) 201 Cal.App.4th 235, 241–242.) “ ‘ “Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].’ ” ’ [Citation.] ‘Issues of witness credibility are for the jury.’ ” (*Ibid.*)

A. Child Abuse

Section 273a, subdivision (a) states: “Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child,

willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.”

Section 273a, subdivision (a) is intended to protect children from abusive situations where “ ‘ “the probability of serious injury is great.” ’ ” (Valdez, *supra*, 27 Cal.4th at p. 784.) But there is no requirement that great bodily injury actually occur. (*Ibid.*) Moreover, the statute proscribes both active and passive child abuse. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215–1216.) In cases involving direct infliction of unjustifiable physical pain or mental suffering on a child, “the defendant must have a mens rea of general criminal intent to commit the proscribed act.” (*Sargent*, at p. 1224.) In cases involving indirect or passive abuse, the defendant must be guilty of criminal negligence. (*Ibid.*; Valdez, at pp. 789–790.) Criminal negligence means conduct that is “ ‘ “reckless, gross or [a] culpable departure from the ordinary standard of due care; . . . conduct . . . [which is] incompatible with a proper regard for human life.” ’ ” (*People v. Toney* (1999) 76 Cal.App.4th 618, 622 (*Toney*).)

In this case, the prosecution did not present evidence that Juana committed abuse by directly injuring Jane Doe. However, there was substantial evidence that in 2014 Juana knew or should have known that Flores was abusing Jane Doe and that Jane Doe was pregnant. There was also undisputed evidence that Juana did not take any steps to protect Jane Doe from Flores’s abuse or to secure needed medical care for Jane Doe’s pregnancy. Juana admitted a motive for her inaction: she was afraid social services would take her children away. Considered in its totality, this

evidence substantiated the jury's implicit finding that Juana was criminally negligent; Juana's failure to protect Jane Doe from Flores and her failure to secure necessary care for Jane Doe's pregnancy was a culpable departure from the ordinary standard of care, which placed Jane Doe in a situation that endangered her life.

Disputing the jury's verdict, Juana contends that the trial evidence establishes unequivocally that she did not know what Flores was doing to Jane Doe, and that a reasonable person in her position would not have suspected Flores of sexual abuse. We disagree. As the sole judge of credibility, the jury was not required to believe Juana's testimony denying knowledge of her daughter's predicament. Furthermore, Juana's denials were inconsistent with other compelling evidence, including Juana's own testimony admitting that she had knowledge of facts that should have caused her to take some action months or years before Jane Doe gave birth to Flores's baby. Beyond all that, Juana's exculpatory statements were directly contradicted by the recorded statement she gave to the police the day after Jane Doe's baby was born, when she admitted thinking that Jane Doe was pregnant and doing nothing about it.

Juana insists that her faith in Flores was reasonable because other people had faith in him as well, as evidenced by the fact that the allegation of abuse that Jane Doe made in 2008 was not substantiated by professional investigators. However, the jury could have concluded from the trial evidence that the reason Jane Doe recanted was because her mother got mad at her for disclosing what Flores had done. In this sense, the 2008 investigation reinforces other evidence that Juana was criminally negligent by failing to protect her daughter from the severe physical and emotional abuse Flores inflicted over a period of years.

B. The Accessory Conviction

Section 32 defines the crime of “accessory” as follows: “Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.”

“The crime of accessory consists of the following elements: (1) someone other than the accused, that is, a principal, must have committed a specific, completed felony; (2) the accused must have harbored, concealed, or aided the principal; (3) with knowledge that the principal committed the felony or has been charged or convicted of the felony; and (4) with the intent that the principal avoid or escape from arrest, trial, conviction, or punishment.’” (*People v. Nuckles* (2013) 56 Cal.4th 601, 606–607.)

We find substantial evidence in the trial record to support each element of this offense. Specifically, a reasonable jury could have made the following findings of fact: Flores, the principal, committed multiple felony sex offenses against Jane Doe, which left her pregnant. Juana knew that Flores sexually abused Jane Doe and that Jane Doe became pregnant, but she did not try to stop the abuse, seek medical or other professional care for Jane Doe, or expose Flores’s crimes. In failing to take protective action or secure medical care for Jane Doe, Juana’s intent was that Flores would escape punishment for his crimes because Juana was afraid that if Flores’s crimes were exposed, she would lose custody of her children.

Juana contends that she had no legal duty to report Flores’s crimes to the police and there is no substantial evidence that she harbored, concealed or aided Flores by actively assisting him. As support for this argument, she

invokes the rule that “the mere passive failure to reveal a crime, the refusal to give information, or the denial of knowledge motivated by self-interest does not constitute the crime of accessory.” (*People v. Plengsangtip* (2007) 148 Cal.App.4th 825, 836.) We note that our supreme court recently affirmed this rule, finding that a section 32 conviction requires proof that the defendant afforded “ ‘overt or affirmative assistance’ ” to the principal. (*People v. Partee* (Jan. 23, 2020, S248520) ___Cal.5th___ [2020 Cal. LEXIS 294, *17].) *Partee* held that “a witness’s refusal to testify in the face of a valid subpoena . . . does not by itself amount to harboring, concealing, or aiding a principal within the meaning of section 32.” (*Id.* at *26.)

In the present case, the jury heard evidence that Juana misled Jane Doe about why she was gaining weight, went shopping with Flores to purchase clothes for Jane Doe that would mask her weight gain, failed to secure medical treatment for Jane Doe when her daughter experienced symptoms consistent with pregnancy, and lied about Jane Doe’s condition when she did finally take her to the emergency room. This substantial evidence of active concealment of Flores’s rampant sexual abuse supports the jury’s finding that Juana actively aided Flores within the meaning of section 32.

Taking a different tack, Juana contends there is insufficient evidence that she intended to aid Flores or conceal his crimes. According to Juana, the prosecutor essentially conceded during her closing argument to the jury that Juana’s sole motivation was to keep her children from being taken away. We reject this argument. There is strong evidence that Juana was motivated by a fear that social services would take her children away. But this motivation is consistent with the jury’s finding that Juana intended to conceal Flores’s crimes. Indeed, a reasonable trier of fact could conclude that Juana’s desire

to retain custody of her children was probative of a concomitant intent to conceal Flores's crimes.

III. Juana Committed Two Distinct Crimes

Juana contends that if her failure to protect Jane Doe from Flores constitutes child abuse, this same conduct cannot also make her an accessory after the fact to Flores's sex abuse. According to Juana, this "outcome" is prohibited by *People v. Prado* (1977) 67 Cal.App.3d 267 (*Prado*).

In *Prado*, co-defendants Gonzales and Prado received a joint trial on charges relating to an armed robbery. (*Prado, supra*, 67 Cal.App.3d at p. 270.) Gonzales was charged with the robbery, apparently on an aider and abettor theory, and with being an accessory to that same robbery based on the same evidence, namely that he drove Prado away from the robbery. (*Id.* at p. 274.) After the jury convicted Gonzales of both charges, the court dismissed the accessory charge and imposed sentence for the robbery. On appeal, Gonzales argued the jury was improperly instructed that they could convict him of either or both charges. (*Ibid.*) The appellate court agreed. It reasoned that the state of mind and intent required for Gonzales to be an accessory after the fact was inconsistent with the intent and state of mind required to be a principal, and that these "mutually exclusive states of mind [gave] rise to mutually exclusive offenses." (*Id.* at p. 273.) Ultimately, the *Prado* court held that "when an accused is convicted of violation of Penal Code section 32, which necessarily requires that a *principal* have committed a specific completed felony and that he knowingly aided that principal with intent that the principal escape arrest, he cannot be convicted as a principal in that completed felony." (*Ibid.*)

Prado's holding has been limited by subsequent authority recognizing that being a principal in a crime and being an accessory to that crime are not

“mutually exclusive as a matter of law.” (*In re Malcolm M.* (2007) 147 Cal.App.4th 157, 165–166 & 169 [collecting cases].) Instead, dual liability can arise from the same crime when the charges are based on factually separate conduct. (*Id.* at pp. 166–169.) An important caveat arising from these dual-liability cases is that accessory liability must be predicated on separate conduct that occurred after completion of the underlying felony in which the defendant was a principal.

Neither *Prado* nor its progeny assist Juana in this case. She was not convicted of being an accessory and a principal of the same crime. Instead, she was convicted of committing felony child abuse, and her accessory liability was for harboring Flores so he would escape punishment for his sex crime(s). Juana argues that the reasoning of *Prado* nevertheless applies because the prosecution relied on much the same evidence to prove that Juana was guilty of child abuse and that she was also guilty of being an accessory to Flores’s sex abuse. But nothing in *Prado* requires that separate crimes be proved by separate evidence, nor does Juana cite any other authority supportive of this proposition.

IV. The Trial Court Did Not Violate Section 654

Finally, Juana claims that even if there was no error in convicting her of two distinct crimes, the trial court made a reversible sentencing error by punishing Juana twice for the “selfsame criminal conduct.” Juana was sentenced to a six-year prison term for child abuse and a consecutive eight months for being an accessory to Flores’s sexual assault of Jane Doe. She now contends that her sentence for being an accessory after the fact should have been stayed under section 654.

Section 654 provides that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the

provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” The purpose of this law “is to ensure that a defendant’s punishment will be commensurate with [her] culpability.” (*People v. Correa* (2012) 54 Cal.4th 331, 341.)

Although the statutory language is limited to convictions based on a single act or omission, section 654 also precludes multiple punishment for more than one offense arising from an indivisible course of conduct; if two or more crimes arose from the same act or series of acts constituting an indivisible course of conduct, multiple punishment is prohibited. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253 (*Kwok*), *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135–1136 (*Liu*).)

To determine whether a course of conduct is divisible under section 654, courts often apply the “ ‘one intent and objective’ test.” (*Kwok, supra*, 63 Cal.App.4th 1236, 1253.) If the “defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an *otherwise indivisible* course of conduct.” (*Liu, supra*, 46 Cal.App.4th at p. 1135, italics added.) But this circumstance is not the exclusive method of determining when separate sentencing is permissible. “[E]ven if a course of conduct is ‘directed to one objective,’ it may ‘give rise to multiple violations and punishment’ if it is ‘divisible in time.’” (*People v. Deegan* (2016) 247 Cal.App.4th 532, 542; see also *People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11.) “Where the defendant’s acts are ‘temporally separated’ they ‘afford the defendant opportunity to reflect and to renew his or her intent before committing the next [offense], thereby aggravating the

violation of public security or policy already undertaken.’” (*Deegan*, at p. 542; see *People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

“The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them.

[Citations.] “We must ‘view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence.’”

[Citations.] “The court’s findings may be either express or implied from the court’s ruling.’” (*People v. Deegan, supra*, 247 Cal.App.4th at p. 545, fn. 4.)

At the sentencing hearing in the present case, the prosecution argued that Juana’s convictions did not “merge together” under section 654, and it requested the maximum sentence for Juana’s crimes. In following that recommendation, and imposing consecutive rather than concurrent sentences, the trial court made two findings supportive of its implicit ruling that section 654 did not apply. First, the court found that being an accessory after the fact was a different crime with a different objective than the child abuse for which Juana was convicted. This finding is supported by evidence that Juana’s objective in long concealing sexual abuse in her home was to preserve her partnership with Flores and for him to maintain his role as an ostensible father, and that her objective in concealing Jane Doe’s pregnancy was for Flores to escape legal consequences for his sex crimes. Because there is substantial evidence that Juana had these two objectives, the court did not err by concluding that her course of conduct was divisible under section 654.

On appeal, Juana contends that the prosecutor conceded at trial that Juana had only a single objective because she repeatedly argued to the jury

that Juana’s sole motive was “to avoid having her children ever taken away from her.” We have already explained why this motive may be evidence of multiple objectives. (*Ante*, at p. 18–19.) Further, even if we could be persuaded that Juana had only a single objective, the court made a second relevant finding at the sentencing hearing. It found that Juana’s crimes were not committed “so closely in time and place as to indicate a single period of aberrant behavior.” The court based this finding on evidence that Juana knew about the sexual abuse of Jane Doe for “years” and yet did “nothing,” which ultimately resulted in her daughter having a baby “when she was 11.” Because there is substantial evidence that Juana’s acts were temporally separated into periods before and after Jane Doe’s pregnancy became visible, and that Juana had the opportunity to reflect and to renew her criminal intent before she became an accessory to the crime that caused Jane Doe’s pregnancy, the trial court was not required to stay Juana’s sentence for that later crime.

FLORES’S APPEAL

Flores’s appeal relates exclusively to his conviction for felony child abuse. As noted previously, section 273a, subdivision (a) prohibits both direct and indirect abuse that either causes harm or seriously endangers the child’s safety.

I. Jury Unanimity

Flores contends that his child abuse conviction could have been based on at least three distinct criminal acts: (1) failing to secure pre-natal care for Jane Doe; (2) having sex with Jane Doe; and (3) using Jane Doe to create child pornography. Therefore, he posits, since the prosecutor did not elect a specific act to prove the child abuse charge, the trial court had a sua sponte duty to give an unanimity instruction as to the specific act that constituted

child abuse. The People dispute this claim, arguing no unanimity instruction was required because the child abuse charge against Flores was based on a continuous course of conduct. We agree with the People.

“Defendants in criminal cases have a constitutional right to a unanimous jury verdict. [Citation.] From this constitutional principle, courts have derived the requirement that if one criminal act is charged, but the evidence tends to show the commission of more than one such act, ‘either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act.’” (*People v. Napoles* (2002) 104 Cal.App.4th 108, 114, italics omitted (*Napoles*).)

The requirement of unanimity as to a particular criminal act is intended to ensure that the jury will agree that a specific crime was committed, but it does not require the jury to agree about how that crime was committed when there is more than one theory whereby the defendant is guilty. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) “Thus, the unanimity instruction is appropriate ‘when conviction on a single count could be based on two or more discrete criminal events,’ but not ‘where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.’ [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.” (*Id.* at p. 1135.)

“Even when the prosecution proves more unlawful acts than were charged, no unanimity instruction is required where the acts proved

constitute a continuous course of conduct.” (*Napoles, supra*, 104 Cal.App.4th at p. 115.) “ ‘Neither an election nor [an] unanimity instruction is required when the crime falls within the “continuous conduct” exception.’ ” (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1178.) This exception applies when (1) closely connected criminal acts form part of the same transaction, or (2) the statutory definition of the offense embraces a continuous course of conduct over a period of time. (*Napoles*, at p. 115; *Jo*, at p. 1178.) The crime of child abuse falls into category (2). Although section 273a, subdivision (a) can be violated by a single act, the statute also contemplates a continuous course of conduct consisting of a series of acts committed over a period of time. (*Napoles*, at p. 115; see also *People v. Avina* (1993) 14 Cal.App.4th 1303, 1309; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462–1464; *People v. Ewing* (1977) 72 Cal.App.3d 714, 717.) An unanimity instruction is neither required nor appropriate when the defendant is charged with a continuous course of abuse. (*Ibid.*)

To determine whether Flores was charged with continuous abuse, we consider the language of the accusatory pleading and the evidence presented at trial. (See e.g. *Napoles, supra*, 104 Cal.App.4th at p. 115.) The amended information charged Flores with committing child abuse during a specified period, from April 2014 through December 2014. This language alerted the jury that the charge was not based on a single discrete act or omission, but a course of conduct to be proved by a series of acts. Furthermore, the trial evidence supported a finding that during this period, Flores committed a series of acts that caused Jane Doe physical and emotional harm and endangered her life. This conduct included sexual molestation, sexual exploitation, getting Jane Doe pregnant, concealing her pregnancy, and failing to help her get medical care. Because the record shows that the child

abuse charge of which Flores was convicted was a continuous course of conduct offense, no unanimity instruction was required.

In developing his appellate arguments, Flores appears to concede that he was convicted of continuous child abuse, but he contends that the continuous conduct exception does not apply and that an unanimity instruction was required because the prosecutor relied on “two separate courses of conduct that were so distinct that they could not be combined into a single discrete crime.” According to Flores, the jury could have convicted him of child abuse based on either (1) a pattern of sexual abuse or (2) a pattern on alleged medical neglect. But, because these patterns are so dissimilar, they cannot be “amalgamated into a single continuous course of conduct.”

Flores’s theory, unsupported by any cited authority, is not persuasive. The course of conduct exception does not come into play unless there is evidence of more than one criminal act that would independently violate the statute. This exception would have no teeth if it was limited to situations in which separate criminal acts also satisfied some nebulous similarity requirement, as Flores now proposes. Regardless, in this case, there is ample evidence that the series of acts that Flores committed during the period that he was charged with child abuse were connected, if not intertwined. During a period of approximately nine months in 2014, Flores sexually molested Jane Doe, used Jane Doe to create child pornography, impregnated Jane Doe, concealed her pregnancy, and failed to seek pre-natal care for her. Contrary to Flores’s appellate argument, these acts were “successive, compounding, and interrelated.”

II. Failure to Seek Medical Care for Jane Doe

Flores contends that his child abuse conviction must be reversed because there is no evidence he had the legal authority to give consent for Jane Doe to receive treatment for her pregnancy. There are two parts to this argument. First, Flores recycles his juror unanimity theory by arguing that the jury could have convicted Flores of child abuse based solely on a finding that he failed to secure medical care for Jane Doe's pregnancy. Second, Flores contends that, as a matter of law, his failure to secure medical treatment for Jane Doe cannot constitute child abuse because he is not Jane Doe's parent. We disagree with both parts of this argument.

As discussed, Flores was charged with and convicted of course of conduct child abuse. Undisputed evidence that Jane Doe did not receive any medical care for her pregnancy was relevant to prove that charge in that it supported a finding that Flores caused Jane Doe to suffer physical and emotional harm and that he also placed her in a situation in which her life and health were in danger by sexually molesting her, impregnating her and failing to report her health condition to anyone who could have arranged for her to receive pre-natal care.

The fact that Flores is not Jane Doe's biological or legally recognized parent does not immunize him from prosecution under the criminal negligence prong of the child abuse statute. As noted previously, this statute proscribes several acts, including when a defendant who, "under circumstances or conditions likely to produce great bodily harm or death, . . . having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his . . . person or health is endangered." (§ 273a, subd. (a).) These "care or custody" provisions are not limited to

parents and family members of the child; they apply also to people who have assumed caregiving responsibilities. (*Toney, supra*, 76 Cal.App.4th at pp. 621–622; *People v. Cochran* (1998) 62 Cal.App.4th 826, 832–833.) “‘Care,’ as used in the statute, may be evidenced by something less than an express agreement to assume the duties of a caregiver. That a person did undertake caregiving responsibilities may be shown by evidence of that person’s conduct and the circumstances of the interaction between the defendant and the child; it need not be established by an affirmative expression of a willingness to do so.” (*People v. Perez* (2008) 164 Cal.App.4th 1462, 1476.)

Here, the record contains ample evidence that Flores assumed duties correspondent to the role of Jane Doe’s father. Indeed, at trial he expressly described Jane Doe as “my daughter.” Furthermore, there was overwhelming evidence that Flores caused and permitted Jane Doe to be injured and that he also placed her in a situation where her life and health were endangered. He did these things not just by failing to help Jane Doe secure pre-natal care, but by causing her pregnancy and then actively concealing his crime.

Flores relies on Family Code, sections 6910 and 6550. These provisions address ways that a minor’s parent or guardian can formally authorize another adult to consent to the provision of medical care on behalf of the minor. Flores argues that these statutes prove that he could not have committed child abuse by failing to secure treatment for Jane Doe’s pregnancy. We disagree. First, these provisions are prescriptive; merely citing them is insufficient to establish Flores’s premise that he could not even seek medical care for Jane Doe without Juana’s written authorization. Second, we find no evidence in this record that Flores lacked authority to consent to the provision of medical care for Jane Doe. Third, and in any event, the child abuse charge in this case was not based on an alleged failure

to authorize treatment for a child's illness. It was based on evidence of a course of conduct that included Flores sexually molesting his step-daughter, impregnating her and then placing her life in danger to hide her pregnancy.

Flores also relies on *Quigley v. First Church of Christ, Scientist* (1998) 65 Cal.App.4th 1027 (*Quigley*). In that case, a 12-year-old boy named Andrew died from undiagnosed diabetes after his father decided to rely on Christian Science treatment when the boy suddenly became ill. Andrew's mother filed a negligence action against the Christian Science church and her ex-husband's mother, Ruth, who had acted as a temporary babysitter during the weeks prior to Andrew's death, but all of her claims were dismissed without a trial. (*Id.* at p. 1030.) Flores contends that he stands in the same position as Ruth, who had no legal duty to seek medical treatment for Andrew. We disagree.

In *Quigley*, the negligence claim against Ruth was based on allegations that, as Andrew's custodian, Ruth had a duty of care under Penal Code section 273a, subdivision (a), which she violated by failing to secure treatment for his illness. (*Quigley, supra*, 65 Cal.App.4th at p. 1038.) The trial court granted Ruth summary judgment based on the following evidence: On the three days prior to Andrew's death, he did not go to school and spent substantial time at Ruth's house. During that time frame, Andrew did not look or act sick and he participated in many activities, including a project to rebuild a motorcycle. Nobody with whom Andrew interacted suspected that his condition was serious until the day that he died, and by that time he was with his father, who made all decisions regarding his course of treatment. Ruth was not Andrew's legal custodian or guardian and did not have written authorization to seek medical care for him. Nobody knew that Andrew had diabetes until after he died. (*Id.* at pp. 1036–1037, 1042.)

In affirming the *Quigley* judgment, the appellate court found that, although Ruth was a caretaker and babysitter for Andrew, her agreement to look after him “off and on, for a period of a few days” did not transform her into a de facto parent. (*Quigley, supra*, 65 Cal.App.4th at p. 1038.) As Andrew’s babysitter, Ruth had a duty of care, but her duties as a babysitter did not obligate her to “seek medical care of a child who did not appear to be seriously ill, and whose parent had not elected to do so.” (*Id.* at p. 1039.) Further, because Andrew appeared to be reasonably healthy during the periods he was in Ruth’s care, his death from lack of medical care was not foreseeable. (*Id.* at p. 1040.) Finally, during the “crucial time period” when Andrew’s condition became serious, he was in his father’s care. The fact that Ruth was present and even assisted in carrying out the treatment decisions that Andrew’s father made, did not transform her into a legal custodian. (*Id.* at p. 1042.)

Quigley is inapposite; this case is not about a temporary caretaker’s failure to secure traditional medical treatment for a sick child in contravention of the wishes expressed by the child’s parent. The trial record contains substantial evidence that Flores assumed the role of Jane Doe’s father and exploited that authority to sexually molest her for a period of several years. There is also substantial evidence that, shortly after Jane Doe turned 11, Flores impregnated her and actively concealed the pregnancy notwithstanding the fact that depriving Jane Doe of medical care endangered her life. Thus, whether or not Flores had written authorization to consent to Jane Doe’s treatment, concealing the pregnancy that he caused had the effect of preventing her from getting care and endangering her life.

In a related argument, Flores contends he was denied the effective assistance of counsel because his trial counsel did not request a special

instruction advising the jury that only parents and guardians can authorize medical care for minors. We reject this claim because Flores cannot carry his burden of showing that the failure to propose this instruction “ “ ‘fell below an objective standard of reasonableness . . . under prevailing professional norms.’ ” ” (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) The Family Code statutes Flores invokes are significantly narrower than he presents them to be; they do not prevent a caretaker from seeking or even requesting medical care for a child. Furthermore, the record is silent as to whether Flores had written authorization to consent to medical treatment for Jane Doe. Finally, there is overwhelming evidence that Flores committed felony child abuse by engaging in a course of conduct pursuant to which he willfully caused or permitted Jane Doe to suffer unjustifiable physical pain and mental suffering, and also placed or permitted her to be placed in a situation in which her life was endangered. Therefore, even if defense counsel should have requested a special jury instruction addressing limitations on giving consent for a minor’s medical treatment, Flores cannot carry his burden of proving prejudice. (*Lucas*, at p. 436.)

III. Instructional Error Regarding Likelihood of Great Bodily Injury

Flores next contends that the trial court committed a prejudicial error by instructing the jury that it could convict Flores of felony child abuse without finding that the abuse occurred under circumstances likely to produce great bodily harm or death. Flores is correct that the instructions were flawed, but the error was not prejudicial.

CALCRIM No. 821 is the standard Judicial Council form instruction for instructing the jury regarding the elements of felony child abuse in violation of section 273a, subdivision (a). It includes four alternate sets of elements that can be used depending on whether the defendant is charged with: (a)

inflicting pain or suffering on the child; (b) willfully causing or permitting the child to suffer pain or suffering; (c) having care or custody of the child and willfully causing or permitting the child to suffer injury; and (d) having care or custody of the child and willfully causing or permitting the child to be placed in a situation where her health is endangered. This model instruction further states that, under each of these scenarios, the defendant must have acted “under circumstances or conditions likely to produce great bodily harm or death.” (CALCRIM No. 821.)

In the present case, the trial court used a modified version of CALCRIM No. 821, which addressed three ways section 273a, subdivision (a) can be violated: willfully causing or permitting a child to suffer unjustifiable physical pain or mental suffering; having care or custody of the child and willfully causing or permitting the child’s health to be injured; and having care or custody of the child and willfully causing or permitting the child to be placed in a situation where her person or health was endangered. The modified instruction used the term “and/or” to signify that these were alternative bases upon which to convict each defendant or both of them of committing this crime. However, the modified instruction did not state that, as to each alternative, the defendant must have acted under circumstances or conditions likely to produce great bodily harm or death. Instead, by using the term “and/or” instead of just “and,” the instruction provided the jury with a fourth alternative basis for conviction were it to find that the defendant “caused or permitted the child to suffer and/or be injured and/or be endangered under circumstances or conditions likely to produce great bodily injury.” As the People concede, this was an error because circumstances or conditions likely to result in great bodily injury is an independent element of felony child abuse.

The “trial court has a sua sponte duty to instruct the jury on the essential elements of the charged offense.” (*People v. Merritt* (2017) 2 Cal.5th 819, 824.) However, “ ‘[a]n instructional error that improperly . . . omits an element of an offense . . . generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution.’ ” (*People v. Gonzalez* (2012) 54 Cal.4th 643, 662–663.) Instead, such errors are reviewed for harmlessness under *Chapman v. California* (1967) 386 U.S. 18. (*Gonzales*, at p. 663.) Under this inquiry, we ask whether it is “ ‘clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.’ ” (*Ibid.*)

Here, we find the instructional error was harmless beyond a reasonable doubt. The factual question posed by the omitted element was whether Flores’s conduct constituted felony child abuse because it was committed under circumstances or conditions likely to produce great bodily harm. The jury necessarily found that this requirement was satisfied when it convicted Flores of committing a lewd act against Jane Doe in 2014, as alleged in count 44 of the amended information and also found true an enhancement allegation that when Flores committed this crime, he “personally inflicted bodily harm on Jane Doe . . . in violation of Penal Code section 667.61(j)(2).” (Emphasis omitted.)

The jury received the following instruction regarding the enhancement alleged in connection with the 2014 lewd conduct charge: “ ‘Bodily harm’ is defined in the following way: Any substantial physical injury resulting from the use of force that is more than the force necessary to commit a violation of Penal Code section 288(a), Lewd Act On A Child Under 14 Years of Age. [¶] Committing the crime of Lewd Act On A Child Under 14 Years of Age is

not by itself the infliction of bodily harm. [¶] . . . [¶] A pregnancy without medical complications that results from unlawful and non-forcible sexual conduct with a minor may support a finding of great bodily injury.”

This instruction was a correct statement of the law. “A pregnancy can provide the basis for a great bodily injury finding.” (*People v. Woods* (2015) 241 Cal.App.4th 461, 488; see also *People v. Cross* (2008) 45 Cal.4th 58, 67–68.) By finding that the enhancement to the lewd conduct charge was true, the jury implicitly found that Flores personally inflicted bodily harm on Jane Doe by getting her pregnant. These acts, the lewd conduct and getting Jane Doe pregnant, were committed during the same period that Flores committed child abuse, thus establishing that he engaged in that course of conduct under conditions that were not only likely to produce great bodily harm but that actually did cause Jane Doe to suffer great bodily harm.

By separate argument, Flores contends that the child abuse instruction was erroneous for another reason: The court modified CALCRIM No. 821 to make it apply to “Either defendant Flores and/or defendant [Juana] or both.” Flores contends that these modifications were a “problem” because they could have led the jury to believe that he was guilty of child abuse if one or more of the elements of this crime was satisfied by conduct that only Juana committed.

Flores did not object to the modified CALCRIM instruction that was used at trial, thus forfeiting any claim that the instruction was too general, lacked sufficient clarity or was incomplete. (See *People v. Welch* (1999) 20 Cal.4th 701, 757 [claims that an instruction is too general, lacks clarity or is incomplete cannot be raised for the first time on appeal].) Flores contends, however, that this claim of error is cognizable on appeal because it affected his substantial rights by permitting the jury to convict him for Juana’s crime.

We disagree. The amended information unambiguously charged each defendant with felony child abuse. We find no indication in the trial record that anyone ever suggested to the jury that Flores could be convicted of child abuse based on Juana's conduct or failure to act. Furthermore, the jury completed separate verdict forms for Flores and Juana with respect to the child abuse charge and thus made separate findings that each of them committed felony child abuse. Finally, there is overwhelming evidence that Flores committed this crime. Under these circumstances, we conclude that although the modified CALCRIM instruction was not a model of clarity, it did not prejudice Flores.

IV. Flores's Constitutional Claim Is Not Well Taken

Finally, Flores contends that his child abuse conviction must be reversed because section 273a, subdivision (a) is unconstitutionally vague.

Constitutional due process "requires 'a reasonable degree of certainty in legislation, especially in the criminal law' [Citation.] '[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" (*People v. Heitzman* (1994) 9 Cal.4th 189, 199 (*Heitzman*)). A provision is sufficiently definite if it provides: (1) "a standard of conduct for those whose activities are proscribed"; and (2) "definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement." (*Ibid.*)

"A number of courts have considered and rejected vagueness challenges to various aspects of the felony child abuse statute. (*Heitzman, supra*, 9 Cal.4th at p. 205.) For example, our Supreme Court has found that by reading the requirement of criminal negligence into the caretaker and custodian provisions of this statute, the standards of conduct required by

those provisions are made sufficiently certain. (*People v. Valdez* (2002) 27 Cal.4th 778.) In this case, Flores finds a different basis for making a vagueness challenge to section 273a. He argues, for the first time on appeal, that the element of this offense requiring that the abuse must occur “under circumstances or conditions likely to produce great bodily harm or death” is too vague in cases where the defendant is charged with (1) being a person with care or custody of a child, who (2) willfully caused or permitted that child “to be placed in a situation where his or her person or health is endangered,” but the evidence shows that (3) the child was not actually harmed. In this discrete situation, Flores argues, the deputy district attorney making a charging decision and the jury during deliberations will have to speculate as to whether the risk of that “non-event” was sufficiently serious to criminalize the defendant’s behavior.

This claim is based on a hypothetical application of the child abuse statute that has no bearing on the legality of Flores’s conviction. In this case there is overwhelming evidence that Jane Doe was actually harmed by Flores’s child abuse. As we have already explained, Flores’s conviction is based on a course of conduct that caused Jane Doe to suffer unjustifiable physical pain and mental suffering and that also placed her in a situation in which her person and health were endangered. There is also ample evidence that Flores committed these acts under circumstances that were not only likely to produce great bodily harm, but that did cause great bodily harm in the form of an 11 year old child’s pregnancy.

“It is well settled that all ‘presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. . . . It is equally well settled that the person attacking the statute bears the burden of demonstrating its invalidity

[citation] and that ‘[o]ne who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is actually aggrieved by its operation’ ” (*People v. Ramirez* (1997) 55 Cal.App.4th 47, 54; see also *People v. Black* (1941) 45 Cal.App.2d 87, 96; *People v. Conley* (2004) 116 Cal.App.4th 566, 576.) Here, the record shows that Flores is not aggrieved by the alleged constitutional infirmity he perceives in the child abuse statute.

DISPOSITION

The judgments are affirmed.

TUCHER, J.

WE CONCUR:

POLLAK, P. J.

BROWN, J.